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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Implementation of the Cable Television) MM Docket No. 92-259
Consumer Protection and Competition)
Act of 1992)
)
Broadcast Signal Carriage Issues)

To: The Commission

REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

OF COUNSEL

Stephanie Storms
Vice President, Law and
Government Relations
and
George Franciscovitch
Vice President, Counsel/Cable
Viacom Cable
P.O. Box 13
Pleasanton, California 94566-0811
Telephone: (510) 463-0870

Katherine A. Hogan
Senior Vice President, General
Counsel/Entertainment
Viacom International Inc
1515 Broadway
New York, NY 10036
Telephone: (212) 258-6136

Sandy Ashendorf
Vice President, Senior Counsel
Law and Business Affairs
MTV Networks
1515 Broadway
New York, NY 10036
Telephone: (212) 258-8373

George H. Shapiro
Robert D. Primosch
Arent, Fox, Kintner,
Plotkin & Kahn
1050 Connecticut Ave., NW
Washington, DC 20036-5339
Telephone: (202) 857-6022

Edward Schor
Senior Vice President
General Counsel Communications
Viacom International Inc.
1515 Broadway
New York, NY 10036
Telephone: (212) 258-6121

H. Gwen Marcus
Senior Vice President and
General Counsel
Showtime Networks Inc.
1633 Broadway
New York, NY 10019
Telephone: (212) 708-1250

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SUMMARY

Viacom urges that the FCC declare that, when must-carry rights conflict with a cable operator's obligations under its existing affiliation contracts with cable networks, must carry requirements cannot be applied until the expiration of those contracts.

On the issue of retransmission consent, MATV, SMATV and MMDS commenters have pointed out that they are subject to retransmission consent but not must-carry, and they thus have argued for various types of relief from retransmission consent requirements. Congress intended to leave resolution of those matters to the marketplace, at least until it produces results at odds with Congressional intent. While MATV, SMATV and MMDS operators must therefore obtain retransmission consent in order to carry local signals, distant signals remain exempt from retransmission consent on cable systems, MATV, SMATV and MMDS systems alike because distant signals cannot make the must-carry/retransmission consent election which determines the class of station to which retransmission consent applies. The FCC should also, as others have requested, declare retransmission consent rights to be unavailable to Canadian and Mexican stations.

Viacom does not support the position of some commenters that the Act requires retransmission consent to become effective on October 6, 1993. The language of the statute does not require an

October 6 effective date, and January 1, 1994 is the optimal effective date for retransmission consent.

A number of commenting parties have urged that local television broadcasting stations have retransmission consent rights irrespective of the provisions of their contracts with their video programmers. The plain language of Section 325(b)(6) precludes a station from exercising retransmission consent rights unless authorized to do so in its licensing agreements with video programmers. Furthermore, there is not, as suggested by at least one commenting party, any basis for according full force and effect only to those aspects of licensing agreement pertaining to copyright. Section 325(b)(6) in fact preserves agreements between video programmers concerning retransmission consent -- arrangements Congress has established as separate from copyright.

With regard to must-carry, the Act does not, as some parties have argued, limit the FCC to considering only simultaneously presented programming in determining whether commercial or non-commercial stations are substantially duplicated. The FCC is correct that on-channel carriage of local television stations is required only when the station's channel is encompassed by a system's basic service tier. Finally, where a station becomes "local" for copyright purposes by virtue of any FCC revisions to Section 76.51, the FCC should allow a cable system to obtain from such stations indemnification agreements (with adequate security provisions) for potential copyright liability.

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Viacom International Inc. ("Viacom") herein submits its Reply Comments on the FCC's Notice of Proposed Rulemaking ("NPRM")^{1/} in the above-captioned proceeding. In these Reply Comments, Viacom does not respond to all issues discussed in the various comments but seeks only to reemphasize certain points made in its initial comments and to address specific issues which it believes require further explication.

Abrogation of Existing Affiliation Contracts.

In its initial comments, Viacom argued that the FCC has no authority under the Cable Television Consumer Protection and Competition Act of 1992 (the "Act") to adopt must-carry rules which authorize a cable operator to abrogate its existing affiliation agreements with cable networks. In support, Viacom cited Congress' removal of preemption language from earlier versions of the Act and its general disposition throughout the Act against overriding existing contracts. Viacom Comments at 7-

^{1/} FCC 92-499 (released November 19, 1992).

12. Viacom also argued that the constitutional requirements imposed on retroactive economic legislation and the very substantial practical problems associated with abrogation militate strongly in favor of non-abrogation of existing contracts. *Id.* at 13-21. Viacom is unaware of anything in the initial round of comments filed in this proceeding which would support a contrary interpretation of the Act on this issue, and in fact other commenting parties have also argued in favor of non-abrogation of existing affiliation contracts. See, e.g., Comments of Black Entertainment Television at 5-6; Comments of Discovery Communications, Inc. at 5-7. Viacom therefore once again urges the FCC to declare that when must-carry rights conflict with a cable operator's obligations under its existing affiliation contracts with cable networks, must-carry requirements cannot be applied until the expiration of those contracts.

Retransmission Consent and Distant Signals.

Viacom argued in its initial comments that distant stations (i.e., those stations which are located outside of a cable system's ADI and are not superstations) are not entitled to exercise retransmission consent rights under the Act, and that a cable system may continue to carry such stations subject only to the cable compulsory license. See generally Viacom Comments at 23-36. Viacom based its argument primarily on the fact that both the language of the statute and its legislative history expressly tie a television station's retransmission consent rights to its

election between must-carry and retransmission consent, and that Congress therefore did not intend for retransmission consent rights to be available to stations which cannot elect between retransmission consent and must-carry. Viacom also demonstrated that when retransmission consent was considered on the floor of both the House and Senate, it was discussed only in terms of the rights of local stations. Viacom notes that other commenting parties in this proceeding have also argued that retransmission consent rights are unavailable to distant stations. See Comments of Continental Cablevision, Inc. at 11-13; Comments of Primetime 24 at 5-7.^{2/}

^{2/} The Comments of Caribbean Communications Corp. and the Puerto Rico Cable TV Association in particular demonstrate the perverse results that will occur if distant stations have retransmission consent rights. Caribbean operates a cable system serving St. Thomas and St. John, Virgin Islands, which must bring in by satellite two of its three network stations; in Puerto Rico, there is not a single United States network affiliate on the island. Hence, cable subscribers in the Virgin Islands and Puerto Rico might lose access to network programming if the FCC allows distant network affiliates to exercise retransmission consent rights. While Viacom recognizes that the signals of local network affiliates are generally available in most of the United States, many cable systems could be required to cease carrying them if those stations elect retransmission consent and are unable to agree on the terms and conditions of carriage. Viacom therefore submits that the situation of the Virgin Island and Puerto Rico cable operators, though somewhat unusual, demonstrates the fundamental problem with giving retransmission consent rights to distant stations: where local network affiliates are unavailable (either because they do not exist or because they will not give retransmission consent) a cable system may be unable to provide any network programming to its subscribers unless it is able to carry a distant network affiliate without first obtaining retransmission consent and without according network nonduplication to uncarried local network affiliates that elect retransmission consent.

Comments filed by MATV, SMATV and MMDS operators have raised issues concerning how retransmission consent applies to multichannel video programming distribution facilities other than cable systems. It is unquestioned that the interplay of Sections 614 and 325(b) accords a local station the right to elect between must-carry and retransmission consent only on cable systems but not on any other multichannel video programming distributor. Hence, under the Act alternative multichannel delivery technologies such as MATV, SMATV and MMDS may only carry local stations pursuant to retransmission consent. Spectradyne, Inc., an entity which operates MATV systems providing local television station signals to hotels, argues that the FCC should create an exemption allowing Spectradyne and other entities like it to carry local stations without obtaining their retransmission consent. Comments of Spectradyne, Inc. at 8-9; see also Comments of Liberty Cable Company, Inc. at 7-8. The National Private Cable Association ("NPCA"), the principal trade association for the SMATV industry, argues that a station's retransmission consent election (and any terms of carriage pursuant thereto) must apply equally to the affected cable system and all competing SMATV systems, and that a station's election of must-carry should grant a competing SMATV system the same right to carry the station's signal without compensation. NPCA Comments at 10-12. The Wireless Cable Association also asks the FCC to prohibit cable operators from entering into exclusive retransmission agreements with broadcasters. Comments of Wireless Cable

Association at 24; see also Comments of WJB-TV Limited Partnership at 4-5.

Viacom submits that the above-described relief requested in the comments filed by the MATV, SMATV and MMDS operators is at odds with Congress's intent to allow the marketplace to determine whether and on what terms a station will grant retransmission consent. As the Senate Committee noted in the Senate Report:

It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.

Senate Report at 36. Clearly, Congress did not intend for the FCC to "micromanage" the implementation of retransmission consent. Moreover, such "micromanagement" is in any event unnecessary. It is unlikely that a local station electing retransmission consent would have any incentive to extract excessive retransmission consent fees from non-cable video programming distributors, since such distributors generally do not compete in any significant way with local stations for advertising dollars. Where a local station elects must-carry on local cable systems, it is inconceivable that the station would charge non-cable video programming distributors anything more than a nominal fee for retransmission consent, since in electing must-carry the station will have already made a marketplace judgment that carriage of its signal is of greater economic benefit to it than the possibility of obtaining retransmission

consent fees. Finally, there is no reason to believe that local stations will agree to exclusive distribution in their retransmission consent agreements with cable systems. There is therefore no reason at this time for the FCC to interfere with the retransmission consent negotiations between any multichannel video distributors and local stations. Should any multichannel video distributor believe that operation of the marketplace is producing results at odds with Congressional intent, it can raise the issue at the time in light of the particular circumstances involved, and the FCC can then determine whether its intervention is authorized under the Act and warranted in light of the facts presented to it.

The requirement that all multichannel distributors -- even those for whom must-carry is irrelevant and inapplicable -- must obtain retransmission consent prior to retransmitting broadcast signals may at first blush seem inconsistent with Viacom's position that the only stations capable of electing between must-carry and retransmission consent constitute the class of stations (i.e., local as opposed to distant) to which Section 325(b) applies at all. There is, however, no inconsistency. The fact that multichannel program distributors other than cable systems can only carry stations with their retransmission consent is not pertinent to the question of which class of stations may require retransmission consent in the first place. As Viacom has shown, only those stations statutorily capable of electing must-carry can exercise retransmission consent rights; that does not change

merely because must-carry does not pertain to some types of multichannel video distribution facilities. For stations that cannot make a must-carry election, i.e., distant signals, both cable systems and other multichannel video distributors can carry them without retransmission consent.

Some commenting parties have asked the FCC to rule that retransmission consent rights are not available under the Act to Canadian and Mexican stations. See, e.g., Comments of Newhouse Broadcasting Corporation at 15-17; Comments of Adelphia Communications Corporation et al. at 30-32. Viacom supports this position. As noted by Adelphia et al., the Act provides that must-carry will be available to any "full power television broadcast station . . . licensed and operating on a channel regularly assigned to its community by the Commission...." Since Canadian and Mexican stations do not operate on channels assigned by the FCC, they cannot elect between must-carry and retransmission consent under the Act. Comments of Adelphia, et al. at 31. There is similarly no reason to believe that Congress intended that a foreign station have retransmission consent rights, and the FCC should therefore adopt a rule expressly limiting retransmission consent rights to domestic stations.^{3/}

^{3/} This result is consistent with the FCC's current network non-duplication and syndex rules. Foreign stations have no network non-duplication or syndex rights under those rules. See Section 76.5(b).

Effective Date for Retransmission Consent.

Viacom recommended in its initial comments that the FCC require local commercial television stations to make their first election between must-carry and retransmission consent by no later than May 1, 1993, and make any must-carry and retransmission consent rules it adopts effective no earlier than January 1, 1994. Viacom Comments at 58. A number of commenting parties, however, have argued that the Act requires retransmission consent to become effective on October 6, 1993. For the reasons set forth below, Viacom submits that an October 6 effective date for retransmission consent is neither compelled by the statute nor the best alternative for minimizing the effect of retransmission consent on cable operator costs and provision of cable service to subscribers, consistent with the overall goals of the Act.

The Act amends Section 325 of the Communications Act to provide that "[f]ollowing the date that is one year from the date of enactment of [the Act]," a cable system or other multichannel video programming distributor shall not retransmit the signal of a broadcasting station except with the express authority of that station or pursuant to Section 614 of the Act if the station has elected must-carry. 47 U.S.C. § 325(b)(1). Hence, Section 325, as amended by the Act, does not require that retransmission consent be effective on October 6, 1993; rather, it allows retransmission consent to become effective only after October 5, 1993, the date of enactment. Furthermore, the Conference Report

on the Act and the Senate Committee Report on S.12 (the "Senate Report") neither require retransmission consent to be effective on October 6, 1993^{4/} nor limit the FCC's authority to establish any effective date after October 5 which the FCC deems will best serve the interests of cable operators and local television stations. In fact, the Senate Report reflects that the Senate Committee delegated to the FCC broad authority to establish procedures governing retransmission consent, subject only to the limitation that the FCC's regulations "permit the fullest applications of whichever rights each television station elects to exercise." Senate Report at 38. The floor debate on S.12 also reflects that Congress generally intended that the FCC have considerable latitude in devising regulations implementing the Act's retransmission consent provisions. See, e.g., Remarks of Senator Inouye at 138 Cong. Rec. S643, S667. Viacom therefore urges that in the absence of statutory language to the contrary, the FCC's authority to devise procedures for retransmission consent must include the right to set an appropriate effective date, subject only the requirement that the effective date be after October 5, 1993. At the most, if the statutory language is interpreted so that October 5, 1993 sets the last day on which carriage of a station which has not consented to carriage is

^{4/} The Senate Report states that local commercial television stations will elect between must-carry and retransmission consent "before the amendments to section 325 become effective," but does not require those elections to go into effect on October 6. Senate Report at 38.

permitted (either by exercising its rights under Sections 325(b) or 614), that language requires only that stations opting to assert consent rights be dropped from cable systems as of October 6 if their consent has not been obtained; stations opting for must-carry and those from which retransmission consent was obtained need not, as a statutory matter, be carried until such time after October 6 as the Commission may mandate.^{5/}

Programming Contracts and Retransmission Consent Rights.

Viacom has asked the FCC to declare that a local commercial station may not grant retransmission consent unless expressly allowed to do so by programming licensing agreements between the broadcast television station and the parties with whom the station contracts for programming. See generally Viacom Comments at 51-55. In addition, Viacom urged that the FCC specifically rule that, in order to determine whether a station is authorized to grant retransmission consent rights, one need look only to the contracts the station itself has entered into with its video programmers -- and not to contracts involving any other parties who may have an interest in the programming. Id.

Certain commenting parties from the broadcast and cable industries have urged the FCC to declare that a local station may exercise retransmission consent rights irrespective of the terms of its contracts with its video programmers. See, e.g., Comments

^{5/} As a practical matter, stations already on a system which elect must-carry rights, or which arrive at a carriage agreement pursuant to Section 325(b), will remain on the system until whatever effective date is adopted by the FCC.

of Tribune Broadcasting Company; Comments of CBS, Inc. at 16-19; Comments of the National Cable Television Association at 36-39. That position, however, is foreclosed by the language at Section 325(b)(6), which states in relevant part:

Nothing in this section shall be construed as . . . affecting existing or future video programming licensing agreements between broadcasting stations and video programmers.

47 U.S.C. § 325(b)(6).

The Act's directive is clear: the retransmission consent provisions not only do not supersede any existing or future contractual arrangements between broadcasting stations and video programmers^{6/} but also do not "affect" them in any way whatsoever. It must be emphasized that Congress did not include this language in the Act simply by oversight. The language originally appeared in the Senate Report,^{7/} and was specifically added to the Act by Senator Inouye in a manager's amendment submitted during the floor debate on S.12. See 138 Cong. Rec. S564, S565 (1992). Simply put, the FCC cannot ignore Section 325(b)(6) when implementing the Act's retransmission consent provisions. The FCC therefore cannot adopt rules allowing a station to exercise retransmission consent rights

^{6/} Several other parties have taken essentially the same position. See, e.g., Comments of Capital Cities/ABC, Inc. at 32-36, Comments of Time Warner Entertainment Company, L.P. at 53-59.

^{7/} See Senate Report at 36 ("[N]othing in this bill is intended to abrogate or alter existing program licensing agreements between broadcasters and program suppliers, or to limit the terms of existing or future licensing agreements.").

irrespective of its contractual arrangements with its video programmers.

Tribune attempts to navigate around Section 325(b)(6) by arguing that its express language -- "[n]othing in this section shall be construed as ... affecting existing or future video programming licensing agreements" -- should be construed as referring to "consensual copyright licenses," and that Congress intended to leave copyright licenses of all sorts (compulsory or consensual) undisturbed on matters of copyright law. The effect, according to Tribune, is to limit the application of above-quoted language of Section 325(b)(6) only to those portions of the licensing agreements pertinent to copyright. Since cable systems have all of the copyright authority they need under the compulsory license to carry broadcast programming, stations could, according to Tribune, freely grant retransmission consent without regard to the provisions of their licensing agreements with video programmers. Comments of Tribune at 14-15. The plain language of the statute is broad and does not bear the interpretation Tribune seeks to impose upon it. There is nothing in Section 325(b)(6) which limits the provision on licensing agreements to "consensual copyright," as Tribune contends. The language of Section 325(b)(6) encompasses the entire licensing agreement between the broadcaster and the video programmer.^{8/}

^{8/} Licensing agreements invariably include many of types of provisions, including provisions pertaining to retransmission of the programming on facilities other than those permitted by the license agreement.

There is no indication in the language or the legislative history of Section 325(b)(6) that Congress meant to reach only the copyright aspects of a broadcast station's licensing agreements with its video programmers.

Moreover, under Tribune's interpretation, the Act's reference to "licensing agreements" would have no meaning. There is no reason for Congress to preserve "consensual copyright licenses," as they affect whether a station can grant retransmission consent to a cable system, because cable systems already have all of the copyright authority they need under the compulsory license for carriage of programs on television stations, irrespective of the provisions of any agreements. The only way to accord meaning to the reference in Section 325(b)(6) to licensing agreements is to treat it, as Viacom and others have urged, as referring to agreements between stations and their video programmers specifying the terms and conditions upon which stations are authorized to broadcast the programs,^{9/} including

^{9/} Cases such Board of County Commissioners, Monroe County, Florida, 72 FCC 2d 683 (1979), cited by Tribune and others, are not pertinent. They apply Section 325(a), which has no provision comparable to the provision on licensing agreements in Section 325(b)(6). Furthermore, Tribune's argument at p. 15 of its Comments that Section 325(b) must, in order to effectuate Congressional intent, be interpreted as permitting a station to authorize retransmission of its entire signal, rather than only those portions with programs for which the station has obtained authority from its video programmers to authorize retransmission consent, is at odds with the specific language of the Act. Section 325(b)(1) provides, in relevant part, that after that Section becomes effective, "no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station or any part thereof," except with consent or
(continued...)

whether or not stations are authorized to grant retransmission consent -- a right Congress has established as a right separate from copyright. Congress clearly intended that all of the provisions of those licensing agreements between stations and their video programmers continue in effect.

Finally, Viacom notes that Tribune has attached as part of Exhibit A to its Comments a portion of a copy of one of Viacom's syndication contracts, providing for the broadcast of the program "A Different World," and has highlighted language in the contract which, inter alia, prohibits the customer television station from authorizing any transmission of the program by cable television systems, microwave systems, boosters, translators, satellites or other similar services. Notwithstanding the language of Section 325(b)(6) and the Act's legislative history, Tribune argues that the FCC should declare such contract clauses ineffective because they "frustrate the intent of Congress." Comments of Tribune at 12. However, Congress made clear that existing contracts between a broadcaster (such as Tribune) and its video programmer (such as Viacom) remain in full force and effect. The FCC has no authority to can declare the contractual provisions referenced by Tribune to be ineffective. To do so would be contrary to the language and intent of Section 325(b)(6).

^{9/} (...continued)
pursuant to Section 614 (emphasis added). If Tribune's argument were correct, there would have been no reason for Congress to include the underscored language.

Indeed, Viacom's inclusion of these provisions in its syndication contracts demonstrates its concern about retaining for itself all rights to authorize retransmission of its programming on facilities other than those specifically covered by its agreements. Unless otherwise specifically negotiated as exceptions to its Standard Terms and Conditions, Viacom's contracts authorize distribution only for broadcast by the existing facilities of the television station involved. The FCC cannot rewrite or reinterpret the private, bargained-for contractual rights of television stations and video programmers to give stations rights that programmers clearly did not intend for them to have. Thus, even if the FCC decides to allow stations to exercise retransmission consent rights in the absence of express contractual authority to do so,^{10/} Viacom requests that the FCC rule that language such as that included in Viacom's syndication contracts will be sufficient to rebut any inference or presumption that a programming contract gives the station retransmission consent rights even in the absence of a specific reference to retransmission consent.

^{10/} Viacom argued in its Comments at 51-55 that grant of the right to authorize retransmission consent should be explicitly set forth in program supplier contracts. Tribune's argument demonstrates why such a requirement is necessary to avoid numerous lawsuits on this issue.

Substantial Duplication Standard.

Viacom has proposed that the FCC determine that a qualified local noncommercial television station will be deemed to "substantially duplicate" another qualified local noncommercial television station for purposes of the FCC's must-carry rules if more than 50% of its programming, either in prime time (as defined in Section 73.662(g) of the FCC's Rules) or during the entire broadcast day, consists of programming aired on the other station. Viacom Comments at 63. Viacom also proposed that the FCC determine that a commercial television station (network or independent) will be deemed to "substantially duplicate" another commercial television station if during the immediately preceding "sweeps" period it has broadcast at least 50% of the other station's programming either in prime time (as defined in Section 76.662(d) of the FCC's Rules) or during the entire broadcast day. Id. at 65-66. With respect to noncommercial stations, Viacom recommended that for purposes of the 50% test duplication of programming need not be simultaneous. Id. at 64.^{11/}

The Association of America's Public Television Stations ("APTS") has proposed that the FCC define "substantial duplication" for noncommercial stations to include only stations that simultaneously transmit identical programming for a majority of the broadcast week. Comments of APTS at 16-20. In support,

^{11/} Although not expressly stated in Viacom's initial comments, Viacom intended that duplication of programming also need not be simultaneous for purposes of its recommended substantial duplication test for commercial stations.

APTS quotes language from the House Report stating that the term "substantially duplicates" was intended to refer to the simultaneous transmission of identical programming on two stations where such programming constitutes a majority of the programming on each station. Id. at 18, quoting House Report at 94. The National Association of Broadcasters ("NAB") quotes the same language in recommending that the FCC should narrowly construe the "substantial duplication" exception to must-carry. Comments of NAB at 21.

With respect to noncommercial stations, the Act does not require that duplication of programming be simultaneous for purposes of the "substantial duplication" test. Section 615(e), which specifically addresses duplication of noncommercial stations unaffiliated with a State network, only requires that "[s]ubstantial duplication shall be defined by the Commission in a manner that promotes access to distinctive noncommercial educational television services." Furthermore, the House Report language quoted by APTS and NAB appears in the section of the Report dealing with must-carry rights for commercial stations only. With respect to the substantial duplication standard for noncommercial stations, the Report only requires the FCC to "develop duplication criteria that promote access to distinctive public television services." House Report at 100. In fact, the House Report for the 1990 version of the Act, H.R. 5267, stated that when defining "substantial duplication" for noncommercial stations the FCC "is to take into consideration both simultaneous

and non-simultaneous duplications of programming." H.R.Rep. No. 101-682, 101st Cong., 2d Sess. at 87. The fact that Congress in the next following House Report specifically discussed simultaneous duplication in the context of commercial stations but did not do so in the context of noncommercial stations strongly suggests that Congress still intended the FCC to consider non-simultaneous duplication when devising a noncommercial "substantial duplication" standard under the Act. Hence, neither the text nor the legislative history of the Act supports APTS's claim that the Act requires a simultaneous duplication standard for noncommercial stations, and in fact reflects that Congress intended the FCC to factor in non-simultaneous duplication of programming when developing that standard.

With respect to commercial stations, Viacom submits that Congress's failure to account for the effect of the FCC's network non-duplication and syndicated exclusivity ("syndex") rules on must-carry suggests that Congress did not fully consider the consequences of applying the "substantial duplication" test to simultaneous duplication only. Unlike the Act's noncommercial must-carry provisions, the Act's commercial must-carry provisions do not eliminate a commercial must-carry station's network nonduplication rights against another commercial must-carry station, and also do not eliminate a commercial must-carry station's syndex rights against another commercial must-carry station. The FCC's network nonduplication and syndex rules apply

to non-simultaneous duplication of programming if the relevant network affiliation or programming contract allows for it. Hence, the language in the House Report on simultaneous duplication would in some situations produce the absurd result of cable systems having to carry two or more commercial stations that broadcast non-simultaneous duplicative programming while at the same time having to delete that same programming pursuant to the FCC's program exclusivity rules. In effect, the cable system could be required to dedicate channels for carriage of stations whose programming may nevertheless be substantially deleted, and consequently those channels would lie fallow and be unused for substantial periods of time. Viacom submits that, at least when the amount of such duplication is substantial, Congress sought to avoid such a result when it authorized cable systems not to carry substantially duplicated must-carry signals. The Act itself does not refer to simultaneous duplication, and its provisions can be best effectuated by adopting a non-simultaneous duplication standard for commercial stations as well.

Channel Positioning for Stations Whose Channel Is Not Encompassed by the Basic Service Tier.

The FCC recognized that, in some situations, a station's channel positioning rights could be inconsistent with a cable system's obligation to establish a basic service tier containing all must-carry stations. It therefore requested comment on its assumption that stations are entitled to on-channel carriage only when the station's channel is encompassed by the basic service

tier on the system. NPRM at ¶ 33. While most commenters supported the FCC's interpretation, APTS in its Comments argues that there is little or no conflict between the basic tier and channel positioning provisions of the Act for cable systems with imbedded authorization capacity and large channel capacity. It therefore urges that, since these systems can incorporate virtually any channel into the basic tier, they should be required to do so where it is technically feasible. APTS Comments at 35. Similarly, in late filed Comments, Fairfax County, Virginia ("Fairfax County") argues that channel positioning issues in this situation can be resolved in the case of many addressable cable systems through the use of channel mapping, programmable scan, and "tag" channel grouping functions. Fairfax County Comments at 7.

Viacom supports the FCC's interpretation that on-channel carriage is required only when the station's channel is encompassed by the system's basic service tier. While there is no opposition to this interpretation for non-addressable systems, even for addressable systems any other solution would raise significant compliance problems. As Viacom described in detail in its Comments filed on January 13, 1993 in MM Docket No. 92-262 concerning tier buy-through provisions, many systems built with "addressable" technology do not have the ability to isolate all channels. For example, a system with six or eight premium channels may utilize addressable converter boxes with a limited number of "tags" (i.e., addressable channels). On these systems,

other, non-addressable technology, such as traps, must be used to secure the various services from theft.

Nor can on-channel carriage requirements for stations operating on channels outside of those encompassed within the basic service tier be implemented with only the addition of a few more addressable channels to accommodate the few stations that are likely to make such requests. It is likely that many cable systems will seek to come into compliance with the tier buy-through provisions of the Act without installing fully addressable systems. This can be done, for example, by installing a single trap that blocks all channels dedicated to expanded basic service. Basic channels and premium channels can then be provided on the unblocked channels, with security for the premium channels provided by scrambling. Any basic-only subscriber who wishes to subscribe to one or more premium channels can then receive those channels with a converter/descrambler unit provided by the cable system because the premium channels are not blocked by the trap. In this situation, if a broadcaster is entitled to on-channel carriage on a trapped channel, a cable operator's entire scheme for compliance with the tier buy-through provisions of the Act is vulnerable to collapse, thus possibly resulting in a requirement that cable systems install considerably more addressable capacity than they otherwise need, resulting in higher costs to cable operators and, ultimately, higher rates to subscribers.